

LETTER OPINION
94-L-62

March 18, 1994

Kathi Gilmore
ND State Treasurer
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505-0600

Dear Ms. Gilmore:

Thank you for your letter asking several questions relating to N.D.C.C. ? 5-04-12 on price and promotion discrimination by beer wholesalers toward retailers within the wholesaler's territory.

Your first question asks the definition of "discrimination." N.D.C.C. ? 5-04-12 states:

Discrimination prohibited. No brewer may discriminate among its North Dakota wholesalers in the price of beer sold to the North Dakota wholesalers or in price promotions. No wholesaler may refuse to sell to any licensed alcoholic beverage retailer in its sales territory. No wholesaler may discriminate among the licensed alcoholic beverage retailers in its sales territory in the price of beer sold to the retailers or in price promotions.

The word "discriminate" is not defined for purposes of N.D.C.C. ch. 5-04. Words not explained in the code are to be understood in their ordinary sense unless a contrary intention plainly appears. N.D.C.C. ? 1-02-02. To discriminate means to constitute a difference between; to differentiate. Webster's New Twentieth Century Dictionary, 522 (2d ed. 1962). "Discriminate" means "to make a clear distinction; distinguish; differentiate." The American Heritage Dictionary, 404 (2d coll. ed. 1991).

It is therefore my opinion that to "discriminate" in

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N.D.C.C. ? 5-04-12 means to treat different retailers within the wholesaler's territory differently in terms of price or price promotions.

"Sales territory" is defined in N.D.C.C. ? 5-04-01 as "the area of primary sales responsibility designated by any agreement between any beer wholesaler and brewer for the brand or brands of any brewer." Thus, the wholesaler's sales territory is based on the agreement with the brewer and not on the location of the wholesaler's warehouses.

The remainder of your questions concern matters of price differences based on geographic location from a beer wholesaler's business facility or on the volume of purchases made by an individual beer retailer. Aside from the provisions of N.D.C.C. ? 5-04-12, the Legislature has not dealt with the relationship between beer wholesalers and beer retailers on matters of price.

Price and price promotions are not defined within N.D.C.C. ch. 5-04. The term "price," however, is generally understood to refer to the cost at which a product is sold. The price of goods may be set to include all freight or delivery charges or such charges may be specified separately. The legislative history of N.D.C.C. ? 5-04-12 indicates an understanding by the North Dakota Beer Wholesalers Association that freight costs could be in addition to the basic price for the beer. See, Hearing on H. 1297 Before Senate Comm. on Industry, Business and Labor, 47th N.D. Leg. (February 1981) (written memorandum from North Dakota Beer Wholesalers Association to Senator Chet Reiten, Chairman, dated February 1981). Cost based delivery charges have generally been allowed under statutes prohibiting price discrimination. See, e.g., Foremost Dairies, Inc. v. Thomason, 384 S.W.2d 651, 653 (Mo. 1964); Heir v. Degnan, 411 A.2d 194 (N.J. 1980).

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It is therefore my opinion that N.D.C.C. ? 5-04-12 does not prohibit a wholesaler from charging transportation or delivery charges to retailers within its sales territory provided such charges are made to every retailer within the territory and are based on actual costs of transportation or delivery.

To the extent the phrase "discriminate in the price of beer" under N.D.C.C. ? 5-04-12 is ambiguous, the ambiguity can be resolved through promulgating rules defining the terms. See Borden Co. V. Thomason, 353 S.W.2d 735 (Mo. 1962) (holding that if in the application of the law prohibiting price discrimination uncertainties existed, the uncertainties could be clarified by rules promulgated by the Commissioner of Agriculture). Prior to 1991 the State Treasurer's rulemaking authority was limited to matters concerning the efficient collection of beer and liquor taxes. 1991 N.D. Sess. Laws ch. 75, ? 8. In 1991, however, N.D.C.C. ? 5-03-05 was amended to provide:

The state treasurer, pursuant to chapter 28-32, shall adopt rules and regulations governing retailers, wholesalers, and manufacturers necessary to carry out the provisions of this title and to ensure efficient collection of beer and liquor taxes. All decisions of the state treasurer are subject to court review.

By adding the phrase "necessary to carry out the provisions of this title" the Legislature broadened the State Treasurer's rulemaking authority. Consequently, it is my opinion that the State Treasurer may promulgate rules which would define the terms contained in N.D.C.C. ? 5-04-12.

In your letter you asked whether quantity discounts may be offered by a beer wholesaler. Courts in other states have addressed the question of whether volume-based discounts violate statutes which prohibit price discrimination. In Foremost Dairies, Inc. v. Thomason, 384 S.W.2d 651 (Mo. 1964), the Missouri Supreme Court considered and struck down as invalid a rule promulgated by the Commissioner of Agriculture which provided that volume pricing results in

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discrimination in price between localities and therefore was prohibited under the statute. The court quoted Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 745 (1947):

Quantity discounts are among the oldest, most widely employed and best known of discount practices. They are common in retail trade, wholesale trade, and manufacturer-jobber relations. They are common in regulated as well as unregulated price structures.

384 S.W.2d at 661. In addition to a statute which prohibited any distributor from discriminating in price in the sale of any milk product furnished from the same plant between any of the towns, cities, municipalities or counties of this state, Missouri also had a statute which specifically prohibited discounts. Even so, the court held that the statute could not be construed to prohibit volume pricing. Id.

Likewise, in Heir v. Degnan, 411 A.2d 194 (N.J. 1980), the court held that the New Jersey statute did not prohibit quantity discounts. The New Jersey statute provided that "it is unlawful for a person selling to retailers . . . to discriminate in price, directly or indirectly, between different retailers purchasing alcoholic beverages other than malt beverages bearing the same brand or trade name and of like age and quantity." Id. at 200-201. A second statute prohibited "wholesalers from denying any retailer a discount available to another retailer purchasing goods of 'like age, quality, and quantity'." Id. at 201. The court held that the challenged rules which allowed discounts to purchasers when justified by actual differences in costs were authorized under the statutes.

N.D.C.C. ? 5-04-12, in addition to prohibiting discrimination in price, prohibits discrimination "in price promotion."

Based on the foregoing, it is my opinion that N.D.C.C. ? 5-04-12 does not prohibit a wholesaler from offering price promotions or volume discounts to its customers as long as the same terms and conditions are available

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to each of the licensed alcoholic beverage retailers
in the wholesaler's sales territory.

Addressing the fact situations you raised which do not
fit within the limits of this opinion would be
appropriate for rulemaking.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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